

number of documents constituting 'labeling' of the various drug products, none of which provided 'adequate directions for use', it seems perfectly reasonable to require that the defendants have the burden of going forward with the production of other labeling which does satisfy the demands of the statute. It would be quite unthinkable to impose upon the government the further necessity of proving that there are no other, secreted, labelings in existence, especially since all such literature used by appellants can be assumed to be in their possession. Therefore we find no error in the conclusion that the labeling of appellants' products did not provide adequate directions for use.

"Appellants present a variety of other defenses, some of which are clearly untenable. For example, it is a bit late in the day to sustain the assertion that the Federal Food, Drug and Cosmetic Act is unconstitutionally vague. Nor, after a review of the entire record, are we able to agree that the court below committed prejudicial procedural errors in its conduct of the trial.

"However, the propriety of the sentences imposed merits a brief comment. It is argued that Counts I and II of the information and Counts III and IV each charged but a single offense and therefore that it was an error to sentence appellants separately on each of these four counts. (The individual defendant is hardly in a position to raise this point, since the sentences imposed upon him were to run concurrently. However, separate fines were imposed upon the corporate defendant as to each count.) The rule is now well settled that a conviction with sentence upon one indictment or information does not bar conviction with sentence upon another 'if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact . . . .' *Eberling v. Morgan*, 237 U. S. 625, 631 (1915); *Ekberg v. United States*, 167 F. 2d 380, 384 (C. A. 1st, 1948). In the present case this test is satisfactorily met. The violation in Count I is based upon the charge that the article was represented as a food for special dietary uses by reason of its vitamin and mineral content, and that the label did not bear certain information required under the authorized regulations issued by the Secretary of Health, Education, and Welfare. In contrast, Count II alleges the same product to be a misbranded drug on the basis of false and misleading statements which appear on the 'labeling' literature disseminated by appellants; and to obtain a conviction under this count the government had to prove the additional fact that the statements contained in such literature were false or misleading.

"The arguments based on Counts III and IV are even more flimsy, for these counts involve entirely different drugs. The drug named in Count III is a tablet known as Vit-Ra-Tox No. 21, which is said on its label to contain 'a mixture of dried extracted juices of cereal grasses green life, plus bone meal, brewer's yeast, fish liver oils, alfalfa kelp (or dulse)'. The drug which is the subject of Count IV is a liquid known as Vit-Ra-Tox No. 16, described in the label thus: 'Colloidal Bentonite (U. S. P. Grade). Distilled water as vehicle with certified flavor and color'. Obviously they are different drugs. As the statute forbids the introduction into interstate commerce of *any* drug that is adulterated or misbranded (21 U. S. C. § 331 (a)), Counts III and IV do not charge the commission of a single offense but rather two separate and distinct offenses, and the sentence imposed upon the corporate defendant by the trial court was therefore entirely proper."

A petition for a writ of certiorari was filed with the United States Supreme Court on 5-23-57, and on 6-17-57 the petition was denied.

5309. Nutrilite food supplement. (F. D. C. No. 39368. S. Nos. 20-490 M, 20-495 M.)

INFORMATION FILED: 2-7-57, Dist. Columbia, against Berneice Small, Washington, D. C.

ALLEGED VIOLATION: On 1-18-56 and 1-27-56, the defendant sold and delivered quantities of the article which had been orally recommended by the defendant for the diseases, symptoms, and conditions set forth below, which acts resulted in the article being misbranded while held for sale.

**LABEL IN PART:** (Pkg.) "Nutralite XX [or "X"] Food Supplement This package contains multiple vitamin capsules and mineral tablets for use as a dietary food supplement to fortify, or supplement, the diet."

**CHARGE:** 502 (f) (1)—the labeling of the article failed to bear adequate directions for use in the treatment of the diseases, symptoms, and conditions for which the article was intended, namely, diabetes, cancer, multiple sclerosis, malignancy, hardening of the arteries, low blood pressure, arthritis, Parkinson's disease, anemia, ulcers, eczema, and cataracts.

**PLEA:** Guilty.

**DISPOSITION:** 5-2-57. Suspended sentence of \$100 fine or 30 days.

**5310. Nutralite food supplement.** (F. D. C. No. 40145. S. No. 33-807 M.)

**INFORMATION FILED:** 8-22-57, W. Dist. Mo., against Floyd W. Raulie, Kansas City, Mo.

**ALLEGED VIOLATION:** On 11-12-56, the defendant, in the course of a sales talk, made oral representations that the article was an effective treatment for the diseases, symptoms, and conditions set forth below, which act resulted in the article being misbranded while held for sale.

**LABEL IN PART:** (Pkg.) "Nutralite Food Supplement This package contains multiple vitamin capsules and mineral tablets for use as a dietary food supplement."

**CHARGE:** 502 (f) (1)—the labeling of the article failed to bear adequate directions for use in the treatment of the diseases, symptoms, and conditions for which the article was intended, namely, colds, ulcers, arthritis, rheumatism, migraine headaches, high blood pressure, and Buerger's disease.

**PLEA:** Guilty.

**DISPOSITION:** 11-1-57. \$25 fine.

**5311. Vitamin and mineral preparations.** (F. D. C. No. 39169. S. No. 42-544 M.)

**QUANTITY:** 1 drum containing 49,750 tablets at Laramie, Wyo.

**SHIPPED:** 6-18-56, from San Martin, Calif., by A. O. Zink.

**LABEL IN PART:** "Therapeutic Nutritional Mineral and Vitamins \* \* \* Material Supplied By A O. Zink \* \* \* Control #402555."

**LIBELED:** 8-8-56, Dist. Wyo.

**CHARGE:** 502 (f) (1)—when shipped, the article was represented for therapeutic use, and its label failed to bear adequate directions for that use.

**DISPOSITION:** 10-9-57. Default—destruction.

**5312. Home vibrator, wheat germ oil, Ver-A-Loe ointment, Papaya Rica, and Kuba Kup.** (F. D. C. No. 39845. S. Nos. 21-218 M, 57-974/7 M, 57-979 M.)

**INFORMATION FILED:** 7-23-57, W. Dist. Mo., against Lloyd C. Shanklin, t/a Harmony Health Foods & Juices, Kansas City, Mo.

**ALLEGED VIOLATION:** Between 8-20-56 and 8-22-56, the defendant made oral representations regarding the purposes, conditions, and diseases for which the articles were intended and caused a book entitled "Chemical Types of People and Their Foods" to accompany the *Ver-A-Loe ointment*, *Papaya Rica*, and *Kuba Kup* as labeling, which acts resulted in the articles being misbranded while held for sale.